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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92058543
Party	Plaintiff Edge Games Inc
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Submission	Motion for Relief from entry of Default Judgment
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Date	07/03/2016
Attachments	MOTION FOR RELIEF FROM FINAL JUDGMENTFinal.pdf(4438036 bytes)



Trademark Trial and Appeal Board
U.S. Patent and Trademark Office
P.O. Box 1451
Alexandria,
VA 22313-1451

July 2, 2016

Re: Cancellation Petition, Proceeding No. 92058543
Motion for Reconsideration/Motion for Relief from Final Judgment

Dear Sirs,

Petitioner mistakenly filed a non-final draft of its motion, one containing a number of clerical and typographical errors.

Attached is the correct version of Petitioner's motion, with exhibit and attachments. Petitioner confirms the attached is the version that was served on Respondent (not the version previously filed in error).

Petitioner thus respectfully requests that the Board give consideration to this correct version.

Sincerely,

A handwritten signature in black ink, appearing to read "T. Langdell".

Dr Tim Langdell
CEO, Edge Games Inc
Petitioner in pro se

cc. Fish & Richardson P.C., for Respondent

CERTIFICATE OF SERVICE

It is hereby certified that on July 2, 2016 a true copy of the foregoing LETTER TO THE BOARD was deposited in U.S. first class mail, postage prepaid, addressed to:

Keith A. Barritt Esq
Fish & Richardson P.C.
P.O. Box 1022
Minneapolis, MN 55440-1022

Signature: /s/ Tim Langdell

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

EDGE GAMES, INC.	}	
(California Corporation)	}	
	}	
Petitioner	}	Cancellation No. 92058543
	}	
v.	}	Mark: EDGE
	}	
RAZER (ASIA-PACIFIC PTE LTD	}	Registration No. 4,394,393
(Singapore Corporation)	}	
	}	Registered: September 3, 2013
Respondent	}	
	}	
	}	
	}	

**MOTION FOR RECONSIDERATION OF DECISION ON
MOTION AND MOTION FOR RELIEF FROM FINAL JUDGMENT**

OPENING NOTE

Petitioner had instructed counsel to represent it since earlier this year, in part to address the concerns expressed by the Board regarding Petitioner's CEO's ability to sufficiently closely follow Board rules and orders. However, it proved impossible to identify and instruct counsel willing and able to draft and file this Motion in the 30-days permitted by Board Rules; this was due in particular to the complexity of this case, the number of issues raised in the Board's June 2, 2016 ruling, and the fact that for the majority of this case to-date Petitioner was in pro se, with the consequence that Petitioner's CEO has the most detailed knowledge of the issues at hand. Thus Petitioner is once again in pro se for the filing of this motion, but wishes the Board to note that Petitioner fully intends to be once again represented by counsel for the remainder of this case should this motion prevail and the matter be heard on the merits.

This Motion for Reconsideration of Decision on Motion (37 CFR 2.127(b)) and Motion for Relief from Final Judgment under Fed.R.Civ.P.60(a)&(b) is made on various grounds: (i) that the Board made errors of oversight in its summary of facts in this case (Rule 60(a)); that Petitioner has grounds of mistake, inadvertence, surprise or excusable neglect (Rule 60(b)(1)); that there is new evidence that impacts the decision the Board should make (Rule 60(b)(2)); that there was misrepresentation or misconduct by the opposing party (Rule 60(b)(3)); that there are other reasons that justify relief in this instance in the interest justice, equity and fairness (Rule 60(b)(6)).

Petitioner moves for reconsideration of, and relief from, the entirety of the Board's decision dated June 2, 2016: both that part which ruled a sanction of judgment against Petitioner based on Respondent's Motion for Sanctions and in the Alternative, to Compel (filed November 17, 2015), and the similar decision rendered in regard to the Board's Show Cause Order of January 11, 2016.

As Petitioner details below, Petitioner's actions did not qualify as willful failure to follow the order of the Board, nor did Petitioner's actions qualify as a willful failure to respect Board Rules such that a sanction of judgment would be a fitting sanction to issue, with no lesser sanction being appropriate.

In regard to the Motion for Sanctions, what the Board appears to be unaware of, is that where Petitioner continued its objections based on privilege or confidentiality, that was solely in respect to a single document. Thus while it may have appeared to the Board that Petitioner was making general sweeping objections to providing various information or producing various documents, in fact all those objections were solely in regard to a single document -- the Velocity Micro Settlement and License -- which Petitioner sincerely believed it was obligated by law to

continue objection to production of since the document contains a requirement that there be a Court Order obtained before it can be produced or its contents revealed.

The Board mistakenly assumed in its decision that Petitioner had acted on its objections for anything other than this single document and mistakenly stated Petitioner had failed to produce any documents. On the contrary, during discovery and by the time Respondent filed its Motion, at all times Petitioner had produced all documents that it could locate in its possession, and all documents supplied to it by its licensee, only ever withholding the aforementioned single document for what was understood to be good reason. Indeed, by the time Respondent served its Motion for Sanctions, Petitioner had served on Respondent every document in its possession, custody and control (852 pages – constituting *every* document requested by Respondent, with the single exception, for what was believed good reason). Petitioner did not fail or refuse to produce any other document based on the objection of privilege or confidentiality. Further, the Board overlooked the fact that the parties were in close contact regarding the timing of Petitioner producing its documents, and that Respondent was fully apprised of when the documents would arrive. Yet further, the parties had agreed to production by mail, and Petitioner produced all the documents by mail as swiftly as reasonably possible after they came into Petitioner's possession.

As this review of this case clearly reveals, while Petitioner's prosecution of this case has been imperfect, all Petitioner's actions have been with the goal of *speeding up* the process of the petition, never intentionally causing any delay. By contrast, all actions of the Respondent have been either to delay the proceedings and deliberately frustrate Petitioner, or have been filing repeated motions aiming to either seek an unfair advantage over Petitioner or to seek a default judgment that denies Petitioner the right to a fair hearing on the merits.

In sum, in regard to the Motion for Sanctions, Petitioner was not guilty of any of the seemingly egregious grounds the Board wrongly concluded supported a sanction of judgment.

As to the Notice to Show Cause, while Petitioner has grounds for overturning the decision based on mistake, inadvertence, surprise or excusable neglect, in addition the Board both misstated the record and misinterpreted the record. Most pertinently, Petitioner did not make *ex parte* contact with the Board on January 8, 2016 as the Board mistakenly believed it had done. When the true facts are taken into consideration, the fair conclusion again is that there is no fair basis to sanction Petitioner and certainly not with the ultimate sanction of judgment.

It would thus be a travesty of justice to deny Petitioner its right to have the matter heard on the merits which is always to be the preferred option over a default judgment other than in very exceptional cases: Petitioner respectfully submits this is *not* such a case.

INTRODUCTION

Respondent's mark (Serial No. 79117898) filed October 4, 2012 wrongly matured to the Register due to various clerical and other errors. There is no reasonable possibility that Respondent's application would have matured to registration had these errors of oversight and inadvertence not occurred.

There are two trademark applications for the same or essentially the same mark ("EDGE") for essentially the same or directly related goods (game computers/computer games) that were filed in October 2010, *two years before* Respondent's October 2012 application was filed, and both of these prior applications are still pending (Serial Nos. 85147499 and 85153958). Further, there is one trademark registration for the same mark ("EDGE") for essentially the same or directly related goods that predates Respondent's application and its first use in U.S. commerce by more than a decade (Registration No. 3713604: filed 8/3/1994, and matured to the

Register 1/26/1999). It was thus clearly an error that Respondent's mark was permitted to go forward to publication, let alone mature to the Register, in the face of the far earlier filed applications and registrations for the same mark for essentially the same goods.

Petitioner's earlier filed application for the mark EDGE GAMES (Serial No. 85147499) is, unusually, in suspension with Respondent's later filed mark cited against it preventing Petitioner's mark from going forward to publication. Petitioner is thus suffering real harm by Respondent continuing to be permitted to have the instant mark on the Register.

Petitioner's chances of prevailing when this petition is heard on the merits are very strong to near certain; by contrast, Respondent's chances of prevailing when this petition is heard on the merits are negligible to non-existent.

While Petitioner's prosecution of the instant proceedings was not without flaw, there was no egregious act by Petitioner warranting the extreme sanction of judgment, nor was there any intentional or willful breach of any Board Order or of any Board Rule. There is also no evidence that Petitioner willfully sought to delay proceedings: Respondent suffered very little delay as a result of Petitioner's actions in the past year and prior to that time to the extent that Petitioner failed to adhere closely to Board rules, this arose from well-intention attempts to *speed up* the progress of these proceedings, not with any intent of *delaying* them.

For all these reasons, most of which were either unknown to the Board, overlooked by the Board or were misunderstood by the Board, it would be a miscarriage of justice for the current Board Order sanctioning Petitioner with judgment to remain in effect. In fairness and equity, the Board's Order for Judgment dated June 2, 2016 should thus be vacated, and the proceedings should recommence with trial dates reset accordingly.

A. Nature of Motion.

A Rule 60 motion is considered to be a continuation of the original proceeding and accordingly the Board has jurisdiction to hear this motion. *Charter Township of Muskegon v. City of Muskegon* (6th Cir.2002) 303 F.3d 755, 762-763. Petitioner has the inherent right to file such a motion and does not seek to first gain permission to do so from the Board. It is within the Board's discretion to consider such a motion and grant relief from judgment where it is reasonable to do so in the interests of justice and fair play. *Rogers v. Hartford Life & Acc. Ins. Co* (5th Cir.1999) 167 F.3d 933, 939.

Because Rule 60(b) is remedial, where relief from judgment is sought in a timely manner and where the movant has a meritorious defense, "**doubt, if any, should be resolved in favor of the motion to set aside the judgment so that cases may be decided on their merits.**" (our emphasis) *American Alliance Ins. Co., Ltd. v. Eagle Ins. co.* (2nd Cir.1996) 92. F.3d 57, 59-61; *Enron Oil corp. Diakuhara* (2nd Cir.1993) 12 F.3d 90, 96; *In re Roxford Foods, Inc.* (9th Cir.1993) 12 F.3d 875, 881; *Augusta Fiberglass Coatings, Inc. v. Fodor Contracting Corp.* (4th Cir.1988) 843 F.2d 808, 812. Further, "Rule 60(b) 'is applied most liberally to judgments in default.'" (quoting *Seven Elves, Inc. v. Eskenazi*, 635 F.2d 396, 403 (5th Cir. 1981)); see also TBMP § 312.03.

Similarly, it is the policy of the law to decide cases on their merits, and that the resolution of an action on the merits wherever possible is a basic tenet underlying the Federal Rules of Civil Procedure. See *Johnston Pump/General Valve, Inc. v. Chromalloy Am. Corp.*, 13 USPQ2d 1719, 1720 (TTAB 1989); see also *Thrifty Corp. v. Bomax Enters.*, 228 USPQ 62, 63 (TTAB 1985).

Finally, this is also a timely Motion for Reconsideration of a Decision on Motion (37 CFR 2.127(b)). Fair reconsideration of its Decision should lead the Board to vacate it.

B. Statement of Facts.

1) In regard to Respondent's November 17, 2015 Motion for Sanctions

- In response to the Board's Prior Order I dated September 25, 2015, Petitioner timely and fully complied with the order by serving on Respondent amended discovery responses that deleted any reference to merit based objections. Since the Board had not ordered Petitioner to also remove non-merit based objections (such as those based on privilege and/or confidentiality) these objections were left in place as general objections mainly to reserve Petitioners right to object and were only originally invoked in respect to the single "Velocity" document.
- While Petitioner continued the objection of privilege or confidentiality in respect to all but two interrogatories, review of the responses shows that only rarely did Petitioner actually withhold any response based on such objection. And where the objection was used to withhold a response, that was solely in relation to a single document (and questions relating to it such as quality control, assignments, etc), arising from the fact that Petitioner sincerely believed it was obligated by law to continue such objections due to a Court Order requirement in a clause of the subject document (Velocity Settlement and License).
- Petitioner did not rely on the objection of privilege or confidentiality to withhold production of any document other than this single Velocity document. Petitioner produced all other documents requested by Respondent in its possession with all confidential and trade secret documents being produced under seal and marked as such.

- The parties had agreed *inter alia* that document production would be via mail (see Langdell decln. exhibited hereto), hence the Board's criticism of Petitioner as having failed to indicate a place and time it would produce documents was unfair and misplaced.
- Further, at the time of serving the discovery responses, Petitioner had not yet been able to gain possession of the documents requested by Respondent, thus it would not have been possible to state a date or place for production since there were no requested documents to produce at that time. It would be unfair and wrong of the Board to criticize or sanction Petitioner for failing to produce documents that were at that time not in Petitioner's possession.
- At all times Petitioner produced to Respondent all documents that it had located and which were in its possession from the moment that Respondent first requested such documents.
- Respondent was fully aware that the vast majority of documents requested were in the possession of Petitioner's licensee, Velocity Micro Inc. ("Velocity Micro"), and were being obtained with all possible speed. The balance of all documents requested by Respondent had been mislaid and were actively being searched for by Petitioner. Thus at all times, per Board Rules, Petitioner promptly produced to Respondent every document in its possession that it could obtain or locate, and at no time did Petitioner either appreciably delay production of any document or willfully hold back producing any document in its possession (despite the

contrary impression that Respondent deliberately mislead the Board by presenting).¹

- The parties were in close contact at all times via correspondence as to when Respondent would receive the documents from Petitioner through regular updates on Petitioner's progress in obtaining documents from Velocity Micro and its progress in locating the mislaid documents from its own files.
- Respondent was *fully* aware that the intent was to depose the CEO of Velocity Micro and that this was likely to happen after November 27, 2015 due to Respondent's counsel stating he'd be unavailable November 17-27. The goal was to thus serve documents on Respondent by November 17, 2015 which is precisely what Petitioner did.
- Accordingly, Respondent was fully aware that the moment Petitioner had located its own documents and the moment it had obtained documents from its licensee, then Petitioner would bundle and number said documents to be served promptly on Respondent.
- Respondent further knew well that the bundle of documents was expected to be served on or about November 17, 2015 -- which is precisely the day that the bundle of some 852 documents was served on Respondent.
- It was thus deliberately misleading of Respondent to file its Motion on November 17, 2015, the day it knew – or should have known -- Petitioner's documents were being produced having now come into Petitioner's possession.

¹ There was only one document in Petitioner's possession that it did not produce at first (but later did produce) and that document – the license and settlement with Velocity Micro Inc. – was only withheld because of the good faith belief that legally it could not be handed over even under the Board's protective order since it was required to only be produce as a result of a Court Order. To save repeating this fact every time, where Petitioner states it handed over "all" or "every" document, it is to be understood that this is with this well intentioned sole exception.

- Most pertinently, at the time Respondent's Motion was filed, Respondent had already been served with all but one document in Petitioner's possession.² And it is important to note that Petitioner had no knowledge of the Motion when it served its documents on Respondent, thus there is no question of Petitioner withholding documents until a motion was filed. That did not happen.
- Rather, Petitioner served the documents on Respondent as soon as they were available to be served, not frustrating or thwarting Respondent at all, and not delaying the discovery process at all at any time.
- The sole document Petitioner withheld was the only one withheld based on privilege or confidentiality (and, again, no other document was withheld from production due to *any* objection). The one document was withheld because it contained wording to the effect that it could not be produced other than by an order of a District Court. Subsequently, in March 2016, substantially before the Board ruled and with the Board having full knowledge, on advice of new counsel Petitioner also produced this document, too, under the Boards Standard Protection Order (marked as confidential and trade secret).
- There is thus no sense whatsoever in which Petitioner continued any objection based on confidentiality or privilege that resulted in any actual refusal to answer an interrogatory or failure to produce any document other than the single document and even that document and all facts relating to it were subsequently fully revealed. Moreover, there is no sense whatsoever in which it could fairly be concluded that by arranging to mail its documents to Respondent as soon as it was

² See footnote above.

possible to do so, and by therefore not stating a date and place for document production in its discovery responses, Petitioner was in any way guilty of affirming a merit based objection as the Board unfairly concludes. Thus there is no sense whatsoever in which Petitioner was failing to adhere to the Board's Prior Order I as the Board wrongly concluded in its Final Decision.

- Although Petitioner believes it is ultimately moot, it did in fact serve a Privilege Log on Respondent (see Exhibit TL3 attached to Langdell decln exhibited hereto). As can be seen, the log contains only the Velocity Micro document (Settlement and License) with the clear explanation that it is considered privileged because of the clause in it calling for a Court Order before it can be produced (even under the Board protection order). However, this issue was also moot since Respondent proposed in its letter of March 24, 2014 that the parties dispense with the production of privilege logs (see Exhibit TL1 to Langdell decln. exhibited hereto). And in Petitioner's letter of April 7, 2014 Petitioner agreed to these terms see Exhibit TL2 to Langdell decln exhibited hereto). Thus the parties had agreed not to produce privilege logs, contrary to the false statement made by Respondent in its October 13, 2015 letter.
- All of Petitioner's actions, however unintentionally misguided at times, have been aimed at *speeding up* the process of discovery and of the petition in general: the early filing of the motion to compel was based on an excusable reason that the other side had written a letter essentially refusing to participate in discovery. Petitioner's 2014 motion, while a few days early, was intended solely to *speed up* discovery; Petitioner served its discovery requests on August 10, 2014 but

Respondent refused to participate fully in discovery until 6-7 months later in Feb 2015 when it finally served what could be called even remotely acceptable discovery responses along with its own discovery requests on Petitioner. Despite Petitioner's repeated efforts to encourage Respondent to participate in discovery, it was not until 6-7 months after serving discovery requests that Respondent first produced even a single page of documents or served even remotely acceptable responses.

- By contrast all actions of Respondent have been either to frustrate and delay or to file endless motions seeking either to gain an advantage in these proceedings over Petitioner or seeking a default judgment so that Petitioner is deprived of a fair hearing on the merits. Respondent's initial discovery requests contained nothing but boilerplate objections to responses to either interrogatories or requests for document production; Respondent has filed numerous motions for default judgment or sanctions, all aimed at delaying these proceedings and at trying to obtain for Respondent a default judgment so that it can avoid having to defend the case on the merits at a trial.

2) In regard to the Board's January 11, 2016 Notice To Show Cause

- Despite appearance to the contrary, **Petitioner did not send an email to the Board *ex parte* on January 8, 2016.** This constitutes new evidence (Rule 60(b)(2)). In responding to the Board's January 11, 2016 Notice to Show Cause, Petitioner relied on the copy of the January 8, 2016 email exhibited to the Notice as showing the email to have been sent *ex parte*. It did not occur to Petitioner to

check whether it actually was sent *ex parte* when filing its responses to the Board's Notice. However, in preparing this Motion, Petitioner discovered that it had indeed blind-copied Respondent with the January 8, 2016 email and thus it was not sent *ex parte* to the Board.

- At the time of filing Petitioner's response to the Board's Notice to Show Cause, Petitioner relied on the copy of the January 8, 2016 email to the Board's Interlocutory Attorney which *appeared* to have been sent *ex parte*. While Petitioner was sure that the email had been copied to Respondent, as was Petitioner's usual practice regardless of the January 2015 Order to do so, Petitioner mistakenly believed that it must have forgotten to copy Respondent. It was an inadvertent oversight, but Petitioner failed to properly research the issue at the time of responding to the Board's Notice.
- On researching the issue, Petitioner has since discovered that Petitioner made a clerical error and had copied Respondent with the January 8, 2016 email by using the "Bcc" line of the email, rather than the more usual "Cc" line. This was clearly an unintentional clerical error which gave rise to the *appearance* that the communication was *ex parte* when in fact it was not (see Exhibit X attached to Langdell decln exhibited hereto)
- In hindsight, Petitioner should perhaps have realized to check for this fact, and apologizes for not doing so at the time. And again in hindsight, Petitioner should have perhaps noted more closely that in its response regarding the Notice to Show Cause Respondent notably did not deny receiving the January 8, 2016 email.

- Petitioner’s actions thus were not contrary to the Board’s January 2015 Prior Order II, even though at the time Petitioner copied Respondent not because it recalled or had noticed any footnote to the January 2015 requiring it to do so, but rather based on Petitioner's usual practice for doing so.
- Petitioner was in *pro se* and was handling up to six concurrent cases before the Board at the same time. In four of the cases (Proceeding Nos. 91212834, 91224787, 91222357 and 92062034), Petitioner was not required to gain permission of the Board prior to filing any motion. In the other of the remaining two cases (an Opposition, No. 91214673) the Board had made an almost identical ruling that Petitioner should first obtain verbal approval before filing any non-consented motion (see Langdell decln. exhibited hereto)
- However, in this other case that verbal approval was to be obtained by Petitioner either telephoning or emailing the Board's Interlocutory Attorney, *ex parte*, with no question that Petitioner had to also involve the other party. (see Langdell decln. exhibited hereto)
- Petitioner recalled that in the body of the Board's Prior Order II of January 30, 2015 it stated that Petitioner was also to gain *verbal* authorization before filing a motion, just as it was required to do in the other Board proceeding. That is, to make *verbal* contact with the Board and gain a *verbal* response. Petitioner does not recall noticing the additional requirements that were added in the Board's Prior Order II in “fine print” in the footnote. Since no such additional requirements were asked of Petitioner in the other concurrent matter before the Board, as far as Petitioner can recall, Petitioner assumed that *ex parte* contact with

the Board was all that was required when seeking verbal authorization to file a motion. Petitioner, understandably, expected consistency of rules between Board Interlocutory Attorneys (see Langdell decln. exhibited hereto). Again, the fact that the January 8, 2016 email was actually not sent *ex parte*, was due to Petitioner's usual practice of copying the other party, not because Petitioner had consciously noticed or recalled any such requirement in the footnote of the Prior Order II.

- By January 2016, given the confusing minor differences in Board procedure between the six Board cases Petitioner was handling, Petitioner genuinely did not recall being aware of the footnote in the Board's January 2015 Prior Order II until the Board drew those requirements to Petitioner's attention in its Notice to Show Cause of January 11, 2016 (see Langdell decln. exhibited hereto)
- The Board had given conflicting and confusing instruction on seeking permission to file unconsented motions which further establishes excusable neglect on the part of Petitioner. For instance, in the Board's Order of April 6, 2015 (20 TTABVUE), the Board confirmed that Petitioner had asked that the Board's January 30, 2015 Order be modified to state that the proceedings be stayed in the event that Respondent were to ask for a telephonic hearing in relation to Petitioner requesting verbal permission to file a motion. If the Board had itself properly recalled the wording of the January 2015 Order (Prior Order II) then it would have noted that it is not Respondent that requests a hearing. But instead the Board affirmed Petitioner's false recollection of the prior order by affirming the false recollection as if accurate.

- Moreover, the Board confirms that it let Petitioner make this request and failed to mention at the time that the request made no sense in the light of the additional requirements the Board had put in the footnote of its Prior Order II.
- In another example, on September 30, 2015 Petitioner made *ex parte* contact by telephone with the Board to ask permission to file an unconsented motion (see Langdell decln. exhibited hereto). And in response the Board initiated *ex parte* contact with Petitioner via telephone on October 5, 2015 granting Petitioner the right to file an unconsented motion (see Langdell decln. exhibited hereto). A copy of the telephone records proving this *ex parte* contact initiated by the Board did occur is attached as Exhibit TL5 to the Langdell decln. exhibited hereto.
- Thus when Petitioner filed its December 8, 2015 one-page addendum to its Reply To Motion, while it was not the intent of Petitioner that the document be taken as an unconsented motion, in fact Petitioner would have been within its right to file such a motion having gained verbal authority to do so in the *ex parte* telephone call instigated by the Board Attorney on October 5, 2015 (note the 10/5/15 call is from the Interlocutory Attorney's number and is incoming, lasting 7 minutes).
- Neither in regard to the December 8, 2015 filing nor in regard to the January 8, 2016 email, then, did Petitioner *willfully* ignore Prior Board Order II and indeed in regard to the January 2016 email it is now known that Petitioner did in fact follow the Board's Prior Order II.
- As to the other examples of grounds for sanctioning Petitioner that are listed on page 7 of the Board's Final Decision, Petitioner directs the Board's attention to the detailed responses given in the Langdell decln. exhibited hereto, which make

clear that these are not examples that can fairly be used to justify the extreme sanction of judgment.

In sum, there are no reasonable grounds for sanctioning Petitioner with the ultimate sanction of judgment, particularly in a case that Petitioner is otherwise certain to win on the merits. There are lesser sanctions that can be given, if indeed any sanctions are warranted at all.

FACT OF THE MERITS OF THE UNDERLYING CASE

This topic is also covered in the Langdell decln. exhibited hereto. The simple fact is that Petitioner's case is so extremely strong that there is virtually no real possibility that, when the case is heard *on its merits*, the outcome can be anything other than Petitioner prevailing. We have an unusual situation at this point in the proceedings since Respondent took it upon itself to file with the Board a copy of all 852 documents that Petitioner produced on November 17, 2015. While the Board would not usually have any evidence before it with which to determine the likelihood of success of a given party, here the Board can easily peruse the 852 pages and see very obviously with key evidence such as the declaration by the CEO of Velocity Micro that Petition has exceptionally strong grounds for priority of use arising from well over a decade of abundant multi million dollar use in US commerce of the mark in question for the same goods in question, all of which use substantially pre-dates the first use by Respondent either in the US or in any overseas territory.

The Board can also see the above referenced two earlier filed applications for essentially the same mark for essentially the same goods, and also the 1999 registration for the same mark for essentially the same or related goods. All this evidence, too, strongly suggests that the Board could not reasonably decide to permit Respondent to keep its instant registration in the light of

the clear proof of Petitioner's long established priority of use and the existence of three rival marks already on the register or ahead of Respondent's mark by priority of filing date.

ARGUMENT

As was summarized at the opening of this motion, both Federal Rules of Court and the Board's own Rules call for any matter to be decided on the merits except in extremely rare and unusual circumstances. Further, the relevant law and rules states that any doubt whatsoever as to the facts regarding a potential sanction of judgment must be ruled in favor of Petitioner. Petitioner respectfully submits that here, once the true facts are considered by the Board, there are not sufficient grounds to warrant the extreme sanction of judgment, and that lesser or alternative sanctions, if any, are called for.

In regard to the Motion for Reconsideration of Decision on Motion, this motion is also timely being filed within one month of the Board's decision on motion of June 2, 2016. Such a motion is permitted and permits the Board to reconsider the facts before it, with the many misconceptions and false statements being addresses herein, such that on reconsideration it is clear that the Board reached the wrong conclusion.

On page 4 of its Final Decision the Board alleges that Petitioner failed to verify its amended interrogatory responses as required by Fed. R. Civ. P. 33(b)(3) (31 TTABVUE 30-49). However, the Board is surely in error since Petitioner did sign (electronically) its amended discovery responses (at page 48, of 31 TTABVUE). According to the TBMP, signature is all that is required and a verification per se is not required since it is implied by the signature:

*FRCP 26(g) (1) **Signature Required; Effect of Signature.** Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name — **or by the party personally, if unrepresented** — and must state the signer's address, e-mail address, and telephone number. By signing, an attorney **or party** certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:*

(A) with respect to a disclosure, it is complete and correct as of the time it is made; and

(B) with respect to a discovery request, response, or objection, it is:

(i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;

(ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and

(iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action. (our emphasis)

The Board does not clarify why it believes Petitioner did not verify the amended discovery responses when they were clearly signed electronically. From a review of Board rules and procedures, Petitioner cannot see a reference to only hand written signatures being acceptable, and notes that in the various proceedings it is involved in before the Board (6 currently) representatives of other parties often use an electronic signature with no objection from the Board. Petitioner also sees no use of an actual "verification" as such being generally used -- even by Mr. Barritt for Respondent on his party's discovery responses.

However, since the Board has left Petitioner to guess why the Board believes the responses were not verified, Petitioner further notes the TMBP rule in the event there is no signature (no verification), which states:

***(2) Failure to Sign.** Other parties have no duty to act on an unsigned disclosure, request, response, or objection until it is signed, and the court must strike it **unless a signature is promptly supplied after the omission is called to the attorney's or party's attention.** (our emphasis)*

Since this is the first opportunity that Petitioner has to correct this alleged "error" since it was first called to Petitioner's attention in the body of the Board's June 2, 2016 Final Decision, Petitioner has attached to Langdell decln. (exhibited hereto) as Exhibit TL4 the last page of each of the three amended and further amended discovery responses, this time specifically verified

and signed by hand. Under the circumstances, these verifications should be considered promptly supplied -- since this is the first opportunity to do so -- and hence Petitioner should not be penalized or sanctioned at all for such failure to verify.

A. Motions are Timely

Both Motions are clearly timely: a Motion for Reconsideration of Decision on Motion can be filed within one month, and a Motion for Relief from Judgment may be filed within one year of the judgment being entered. Both instant motions are thus timely.

B. Motions are Meritorious

Petitioner submits that consideration of this motion along with consideration of the exhibited Langdell declaration leads one to the only fair conclusion that these motions are meritorious and should be granted in favor of Petitioner.

SUMMARY AND CONCLUSION

A. In regard to the allegations supporting the Board's decision of sanction of judgment in relation to Respondent's Motion for Sanctions

ALLEGATION: In regard to Respondent's deliberately false and misleading statement that Petitioner's amended discovery responses "are still woefully inadequate and clearly demonstrate [Petitioner's] determination not to cooperate in discovery and to deny [Respondent] the information to which it is entitled." RESPONSE: **Not true.** The 10/19/15 responses fell only a little short of what Respondent later clarified it was seeking given Petitioner had what it believed to be good faith grounds to continue objection regarding the Velocity document. The 12/5/15 version satisfied all Respondent's requests in full, not invoking *any* objection.

ALLEGATION: That Petitioner continued objections based on confidentiality and privilege. RESPONSE: **Technically true but not improper.** While it is technically true that

Petitioner continued to reserve such right to object by repeating its blanket objections based on such non-merit grounds as confidentiality and privilege, the Board overlooked the critical fact that Petitioner did not actually invoke any such objection to either refuse or fail to answer fully any interrogatory, or refuse or fail to produce any document, other than in regard to the single Velocity document and issues pertaining to it such as quality control, assignment. and etc.. The blanket objections were primarily left in for purely technical purposes of reservation of rights since the Board had not asked that they be removed. In its 12/5/15 responses, Petitioner answered all interrogatories, not withholding response to any due to such objections. Petitioner produced all requested documents, utilizing the Board's standard protective order to designate any documents as confidential or trade secret, as appropriate, initially only withholding the Velocity document, and then producing that, too. With that exception, all other such documents were produced and served on Respondent *prior* to Respondent filing its Motion for Sanctions.

ALLEGATION: Petitioner failed to produce a privilege log. RESPONSE: **Not true.** Petitioner did produce a Privilege Log on April 7, 2014 which contained one document in its list, the Velocity document. Although this point is moot since: (a) as Respondent's letter of March 24, 2014 and Petitioner's response of April 7, 2014 prove, the parties had agreed to dispense with production of privilege logs; and (b) Petitioner did not actually withhold any response to any interrogatory, nor did Petitioner fail to produce any document, based on any privilege objection. Hence the existence or absence of a privilege log was and is irrelevant and moot. Petitioner's 10/19/15 responses were in line with there being just the one document in the privilege log.

ALLEGATION: Petitioner showed intent to delay proceedings and thwart Respondent's discovery of relevant information in violation of Fed. R. Civ. P. 26(g)(1)(B)(ii). RESPONSE: **Categorically not true.** As is clear from the true facts and evidence.

ALLEGATION: “Petitioner did not produce documents.” RESPONSE: ***Categorically not true.*** As is clear from the true facts and evidence.

ALLEGATION: "Petitioner responded only that it would produce responsive documents without specifying the date or place of production." (and that this was thus effectively a merit based objection in violation of Prior Board Order I). RESPONSE: ***Categorically not true.*** As is clear from the true facts and evidence.

ALLEGATION: That the sanction of judgment is justified “where opposer’s discovery responses and supplemental discovery responses “demonstrate[d] opposer’s intent to continue to delay [the] proceedings by setting up obstacles to applicant’s receipt of clearly relevant information.”” RESPONSE: ***Categorically not true.*** As is clear from the true facts and evidence.

In sum, all of the grounds cited by the Board as justification for sanction of judgment are either untrue, unfair or invalid and neither singularly nor collectively rise to the level of justifying the extreme sanction of judgment whereby Petitioner’s right to a hearing on the merits is denied.

B. In regard to the allegations supporting the Board’s decision of sanction of judgment in relation to the Board’s Notice to Show Cause

ALLEGATION: On December 8, 2015, without Board approval, Petitioner filed a one-page addendum to its brief not intended as a motion, but which was interpreted by the Board as an unconsented motion. RESPONSE: **Paper was not intended as a motion, but if the Board wishes to interpret it as such then Petitioner had verbal approval to file it granted verbally on October 5, 2015.**

ALLEGATION: That on January 8, 2016, Petitioner's Chief Executive Officer sent the assigned interlocutory attorney an *ex parte* email. RESPONSE: **Not true.**

ALLEGATION: That Petitioner filed an untimely motion for sanctions based on Respondent failing to take part in a discovery conference. RESPONSE -- **Not fair conclusion.** The conclusion the Board reaches overlooks the fact that Petitioner genuinely believed that the Board had recommended filing said motion to enable the Board to become involved and assist resolving the inter-party dispute. It was a unintentional reasonable misunderstanding.

ALLEGATION: That Petitioner filed an untimely motion to compel discovery. RESPONSE: **Technically true but with mitigating circumstances.** Respondent had written Petitioner a letter stating it would not participate in discovery so while Petitioner should have waited a few days more before filing the motion, the motivation and justification behind the motion was well merited.

ALLEGATION: That Petitioner filed an amended motion while proceedings were suspended. RESPONSE: **Not a fair conclusion.** Petitioner created its amended motion one day prior to the Board issuing an order suspending proceedings. Petitioner's filing of its amended motion crossed over with the Board's ruling, and thus when Petitioner filed its motion it had no knowledge that a suspension was now in place.

ALLEGATION: That Petitioner embedded a request for extension of time in a filing. RESPONSE: **Not technically true.** Petitioner, perhaps ill-advisedly, inserted a comment that if the Board were to rule in Petitioner's favor then Petitioner's filing should be processed as a request for extension. However, the Board did not rule in Petitioner's favor hence the request for extension technically never occurred. Regardless, this minor infraction, at best, is not a fair basis for the sanction of judgment.

ALLEGATION: That Petitioner served new discovery requests on Respondent while the proceedings were suspended. RESPONSE: **Technically true, but Respondent did the same exact thing.** It would thus be grossly unfair to penalize Petitioner at all for this transgression, let alone use this as a basis for the sanction of judgment, given that the Board would be simultaneously condoning the exact same behavior by Respondent by not also sanctioning Respondent in like kind.

ALLEGATION: That Petitioner failed to include proof of service for possibly two of its filings. RESPONSE: **May be technically true, but not a fair basis for sanction of judgment.** Petitioner failed on possibly two occasions to attach its proof of service to what it filed with the Board, but it did not fail to attach those proofs of service to the copy actually served on Respondent. Thus while a technical misstep, this surely does not rise to the level of justifying a sanction of judgment.

ALLEGATION: That Petitioner via its attorney requested an extension of time without approval. RESPONSE: **Technically true, but not fair to include as a basis of justifying sanctions.** Petitioner was grossly mislead by the attorney in question, who clearly was incredibly incompetent. While the Board makes the point that a party is responsible for controlling their counsel, surely allowance must be made in fairness and justice when an attorney grossly misleads a party and files a document that was obviously not approved by the party.

ALLEGATION: That Petitioner did cause delays in the proceedings arising from the Notice to Show Cause. RESPONSE: **Not true.** These proceedings were suspended from November 17, 2015 pending a ruling on the Motion for Sanctions, and remained suspended until the Board's Final Decision of June 2, 2016. Thus the Notice To Show Cause, including briefing it, did not cause any additional delay at all to these proceedings.

ALLEGATION: That Petitioner has shown a clear pattern of delay in these proceedings that have been ongoing for over 2 years. RESPONSE: **Categorically untrue.** On the contrary, without exception Petitioner has taken steps at all times to seek to hasten the prosecution of this case, whereas it is Respondent who has clearly done all it can to delay these proceedings. It is Respondent that has filed numerous motions for sanctions and summary judgment, and at every turn has either sought to delay proceedings or has sought to gain a default judgment on some technicality (via sanctions) so as to avoid having to face Petitioner at a trial on the merits -- a trial Respondent knows it will lose.

In summary, while Petitioner's prosecution of this case has not been without flaw, there is no evidence that Petitioner has willfully disobeyed Board orders or flaunted Board rules and procedures. The extreme sanction of judgment should only be very rarely issued and only in exceptionally egregious circumstances, none of which are present here. On review, the most egregious transgressions the Board believed Petitioner guilty of are seen to be untrue. The remaining transgressions, such as they are, may still justify some kind of sanction, but if they do then it is not a sanction anywhere near as draconian as judgment -- a sanction that would grossly unfairly deny Petitioner the opportunity to have the case heard on its merits. It is noted that in prior cases before the Board, the sanction of requiring Petitioner be represented by counsel was the sanction given in even appreciably *more* egregious circumstances that are present here.

Dated: July 1, 2016

Respectfully submitted:

By: /s/ Tim Langdell
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

EDGE GAMES, INC.	}	
	}	
Petitioner,	}	Cancellation No. 92058543
	}	
v.	}	Mark: EDGE
	}	
RAZER (ASIA-PACIFIC) PTE LTD	}	Registration No. 4,394,393
	}	
Registrant	}	
	}	
_____	}	

CERTIFICATE OF SERVICE

It is hereby certified that on July 1, 2016 a true copy of the foregoing
MOTION FOR RECONSIDERATION OF DECISION ON MOTION AND MOTION FOR
RELIEF FROM FINAL JUDGMENT, was deposited in U.S. first class mail postage prepaid,
addressed to:

Keith A. Barritt Esq
Fish & Richardson P.C.
P.O. Box 1022
Minneapolis, MN 55440-1022

Signature: /s/ Tim Langdell

EXHIBIT

Declaration of Dr Tim Langdell
with attached Exhibits

3. Comparing Respondent's request for further discovery responses with the amended responses Petitioner served reveals that Petitioner made a good faith effort to respond fully in each instance. Respondent's justification for the extreme label of "woefully inadequate" in the end boils down to the single dispute between the parties over a single document, which dispute was fully resolved well before the Board rendered its Final Decision.

4. Respondent tried to make it appear that Petitioner was continuing to give "woefully inadequate" responses by suggesting there were additional facts or documents that Petitioner was holding back. But as Petitioner's further amended discovery responses revealed (see 32 TTABVUE and 33 TTABVUE; exhibited to Petitioner's Response to Respondent's Motion for Sanctions), what Respondent was really complaining about was having a single document produced that had not already been produced, and having the details of that document stated in response to interrogatories.

5. None of Respondent's further requested amendments to the discovery responses came *remotely* close to justifying the phrase "woefully inadequate." At best, a more accurate phrase would have been "arguably adequate" in regard to the first amended responses served on Respondent October 19, 2015, and then "fully adequate" as to Petitioner's further amended responses served December 5, 2015.

6. As to the allegations that Petitioner failed to properly adhere to Board rules and orders, while I accept that Petitioner's prosecution of this case was imperfect, in key instances review of the true facts shows that Petitioner actually did make good faith effort at all times to adhere to board orders, and in the remaining instances there were mitigating factors that mean a sanction of judgment would be unjustifiably draconian given it denies Petitioner the right to a trial on the

merits in a case where Petitioner is almost completely certain to prevail on the merits if this matter is permitted to go to trial.

RESPONDENT'S REQUESTS FOR DISCOVERY RESPONSE AMENDMENTS

7. In response to Respondent's first set of interrogatories, first set of request for admissions, and first set of request for production of documents, in its timely served October 5, 2015 discovery responses Petitioner gave sincere, good faith attempts at responding to all Respondent's requests.

8. In its letter of October 13, 2015, Respondent raised a number of issues it had with Petitioner's amended discovery responses. Any fair-minded review of this communication by Respondent would conclude, as I did when I read it, that Respondent was only asking for minor clarifications and that a number of typing errors be corrected. While Respondent was suggesting that Petitioner was withholding information or documents that Respondent believed it has a right to, all that was required in drafting Petitioner's amended discovery responses was to clarify -- as I did when I drafted same -- certain minor points and otherwise simply confirm that the additional information is not available or the additional documents are not in Petitioner's possession. The sole issue of any merit was that Petitioner was continuing objection that it believed to be justified (and in fact, required) in regard to a single document that contained a Court Order requirement.

9. In this October 13, 2015 communication Respondent falsely states that the parties have not agreed to dispense with the production of privilege logs. However, this is not true since in its March 24, 2014 letter Respondent proposed that the parties dispense with privilege logs (see Exhibit TL1 hereto and 7 TTABVUE 19-20), and Petitioner's response dated April 7, 2014 accepted the proposal to dispense with logs (Exhibit TL2 hereto).

10. In Petitioner's further amended discovery responses of October 19, 2015, Petitioner made a good faith effort to address each and every issue raised by Respondent in its October 13, 2015 letter. And as can be seen by review of the October 19, 2015 further amended responses, by Respondent's own admission, Petitioner did successfully address many of the issues to Respondent's satisfaction.

11. It is true that Petitioner did continue objection on the grounds of privilege and/or trade secrets in regard to *a few* of the discovery requests propounded by Respondent. But these were all in relation to a single document. That is, details contained within the Settlement and License documents executed with Velocity Micro Inc, which document contained a specific reference to its contents not being revealed (even under seal with the Board) without a District Court Order calling for its production and for revealing its contents.

12. Thus on October 19, 2015 Petitioner sincerely believed that it had no option other than to continue the privilege and confidentiality objections since they exclusively related to details in this document pertaining to quality control and assignments, etc. The only reason I did not clarify further why the objections were being sustained by giving specific detail was because Respondent was well aware by this point that the Velocity document was already the sole document in Petitioner's privilege log (See Exhibit TL3), and Respondent was also well aware of the reason why Petitioner believed it was obliged by law not to reveal such detail (since the document called for a Court Order before revealing detail of contents).

13. Despite receiving on or about October 19, 2015 Petitioner's good faith effort to address Respondent's concerns outlined in its October 13, 2015 letter, Respondent failed to indicate to Petitioner that it still had any concerns over Petitioner's October 19, 2015 amended responses. By failing to indicate that it was in any way still dissatisfied with Petitioner's October 19, 2015

amended discovery responses, Petitioner reasonably assumed that Respondent accepted the fact that certain requests had to be objected to until and unless Respondent sought and gained the necessary Court Order called for before the details of the Velocity document could be revealed or even filed under seal in accord with the Board's standard protection order.

14. It was not until almost a full month later, on November 17, 2015, that Respondent eventually revealed that it was still dissatisfied with Petitioner's October 19, 2015 further amended discovery responses -- and that dissatisfaction was not contained in a reasonable and good faith further communication sent to Petitioner (as was the October 13, 2015 letter), but rather Petitioner first learned of Respondent's ongoing dissatisfaction when reading Respondent's Motion for Sanctions filed November 17, 2015.

15. Upon reading Respondent's motion I discovered for the first time that Respondent was still dissatisfied with Petitioner's responses. I sincerely believed in good faith that since Respondent had not reacted in any way to the October 19, 2015 further amended responses, that they were now acceptable to Respondent.

16. On reading Respondent's November 17, 2015 Motion for Sanctions, it became clear to me that Respondent was confused about Petitioner's amended responses, and that Respondent falsely believed Petitioner was withholding information without good cause, and was withholding documents in its possession.

17. Since the issue of delays in Petitioner gaining possession of the requested documents was discussed at length in inter-parties correspondence (see 31 TTABVUE and 38 TTABVUE), I knew that when I indicated on October 5, 2015 that Petitioner anticipated producing documents "shortly" that I was of course referring to the fact that Petitioner still had none of the requested documents in its possession to produce at that time, but that Petitioner *anticipated* "shortly"

either uncovering the mislaid documents or receiving the documents promised by Velocity in advance of the then planned shortly upcoming deposition of Velocity's CEO.

18. To be clear, Respondent knew, and I was relying on Respondent knowing this, that in my October 5, 2015 letter where I indicated documents would be produced "shortly" I was not stating Petitioner had the documents in its possession but was being slow to produce them, rather it was well understood between the parties that at that time Petitioner was anticipating getting the documents into its possession "shortly" and that once in Petitioner's possession they would of course then be promptly produced and served on Respondent -- which is precisely what I caused to happen on November 17, 2015, before I had any knowledge at all that Respondent had filed a Motion for Sanctions.

19. In good faith and with a view to always seeking to first resolve any inter-party discovery dispute between the parties before filing a motion to compel or for sanctions, Respondent should have responded to Petitioner's October 19, 2015 further amended discovery responses indicating where it was still dissatisfied, and permitted Petitioner to have a further chance to yet further amend its responses well before Respondent filed a motion with the Board. Respondent did not come close to first attempting a good faith resolution of discovery issues with Petitioner before filing its November 17, 2015 motion.

20. In response to the further clarification given by Respondent in its Motion for Sanctions regarding its ongoing dissatisfaction with Petitioner's discovery responses -- which dissatisfaction would better have been done as an inter-parties letter -- I drafted a further set of revised amended discovery responses which was served on Respondent on December 5, 2015 and exhibited as Exhibit 9 to Petitioner's Response to Respondent's Motion, filed December 7, 2015 (32 TTABVUE and 33 TTABVUE).

21. As can be seen in the covering letter sent to Respondent on December 5, 2015, Petitioner admonished Respondent for taking a month to voice any continued objections to Petitioner's October 19, 2015 amended responses, and for not exercising good will by writing directly to Petitioner, but instead only informing Petitioner through the medium of a filed motion.

22. Based on the continued expression of dissatisfaction with Petitioner's discovery responses detailed by Respondent in its Motion, I caused a yet further set of revised amended discovery responses to be served on Respondent on December 5, 2015. With deep respect, this set of revised further amended discovery responses fully addressed **all** of Respondent's outstanding concerns -- it removed **all** objections based on privilege, confidentiality or trade secrets, and it gave all the detail Respondent was requesting regarding quality control, details of assignments, and so forth.

23. The revised further amended discovery responses of December 5, 2015 also clarified that the bundle of 852 pages of documents served on Respondent on November 17, 2015¹ (before I became aware Respondent had filed a motion that same day) contained every document requested by Respondent that was in Petitioner's possession as at that date, with the sole exception of the Velocity Settlement and License which at that point in time I believed Petitioner was barred by law from producing without a Court Order. In these revised further amended discovery responses I made very clear to Respondent that every interrogatory had now been answered fully with no objections relied upon to withhold anything, and that every document requested by Respondent had been produced with that sole exception. And, further, to make the

¹ It should be noted that there is no dispute between the parties that Respondent was served with the bundle of 852 pages of documents in November 17, 2015, not least since in a strange twist Respondent exhibited all 852 pages to its Response in Support of Motion dated December 21, 2015 (38 TTABVUE) using the Board's standard protective order to file many of the documents under seal, reflecting the way that the documents were served on Respondent with those documents being designated Trade Secret. Thus, unusually for this stage in a petition action, the Board has before it all 852 pages of documents that show beyond reasonable doubt that if heard on the merits Petitioner is certain to prevail in this petition.

point very clear, if a document had not been produced then it is because it is not in Petitioner's possession at the time.

24. I also sincerely believed I had made clear to Respondent that any delay in producing the 852 pages of requested documents was not because of any intentional delay by Petitioner, it was solely because Petitioner was still searching for missing documents and still waiting on Velocity Micro to produce documents to Petitioner, before producing documents to Respondent. Thus at all times during the discovery process Petitioner had promptly produced to Respondent those requested documents that were in Petitioner's possession. Further, Respondent was well aware that Petitioner was compiling a numbered bundle of all documents (those found by Petitioner and those produced by Velocity) in preparation for the then-anticipated deposition of Velocity's CEO. Thus any delay whatsoever was occasioned by Petitioner in good faith sorting the documents into related topics and chronology, and then the time that it took to copy, scan and sequentially number the pages in order to create the **852 page** bundle that was served on Respondent on November 17, 2015.

25. Thus by December 5, 2015 Respondent had been served with revised amended discovery responses that fully addressed all of Respondent's noted concerns and indeed I believe I recall that Respondent does not deny this fact in its Reply dated December 21, 2015. The only requested document in Petitioner's possession as at the time of Respondent's motion was the Velocity Micro document that had the Court Order restriction associated with it. This last remaining document was then also served on Respondent on (March 7, 2016) when counsel advised that it be served under the Board's standard protection order, informing me for the first time that I had perhaps been misguided -- but in good faith -- in withholding the document previously. Thus by March 7, 2016 Petitioner had produced absolutely every document in its

possession requested by Respondent, including the previously withheld in good faith Velocity document, along with another newly discovery document that was also promptly produced and served on Respondent upon being discovered.

26. Consequently, by December 5, 2015, promptly after first learning of Respondent's ongoing concerns, Petitioner had fully addressed all but one concern relating to one document. And by March 7, 2015 -- some *three months* before the Board rendered its decision on the Motion for Sanctions, and with the Board made fully aware of the further production -- Respondent's discovery requests for information and for documents had been 100% satisfied with no indication whatsoever that Respondent did not agree all discovery requests were now satisfied.

REGARDING MOTION FOR SANCTIONS: PETITIONER NOT GUILTY OF WILFULLY DISOBEYING BOARD ORDERS OR WILLFULLY DISREGARDING BOARD RULES.

27. I will start with the allegations made in regard to Respondent's *Motion for Sanctions or in the Alternate Motion to Compel*. First, as I covered above, it is at the least hyperbole, and at worse a deliberate attempt to mislead the Board, for Respondent to allege that Petitioner's amended discovery requests dated October 5, 2015 were "woefully inadequate."

28. By the time Respondent filed its Motion it had already been served with every document requested of Petitioner and in Petitioner's possession with the sole exception of the Velocity document that in good faith I believe the law forbade Petitioner to produce and forbade Petitioner to disclosure the details of. While Petitioner continued some blanket objections, particularly in regard to privilege and trade secrets, these objections were solely in relation to this Velocity document that I sincerely believed the law requirement me to continue objections in respect to. Given the requirement of a Court Order before the document could be entered into

evidence in any proceeding (including any proceeding before the Board), I sincerely believed -- in good faith -- that I was barred by law from producing that document or revealing its contents, which in turn meant Petitioner was obliged to continue the objections.

29. But this document -- and the information relating to it regarding quality control, assignments, etc. -- was the only document, and the only information, requested by Respondent that Petitioner continued, in good faith, to object to production of. In hindsight, it may have assisted the Board if Petitioner had specifically clarified that the objections based on privilege and trade secrets were solely in regard to the single Velocity document and its contents. But I would ask the Board to bear in mind that at the time in question, the document was an inter-parties document that I had some right to assume could rely on shared knowledge between the parties. And as of October 5, 2014, and indeed as of the further amended responses on October 19, 2014, Respondent was well aware of the single issue of contention over the Velocity document that meant Petitioner was objecting based on privilege and trade secrets.

30. To be clear, the continued objections for privilege and trade secrets did not relate to any other information requested by Respondent other than the contents of the Velocity document, and did not relate to any refusal to produce a document other than the Velocity document. I wish to make this clear since Respondent deliberately tried to give the impression to the Board that Petitioner was generally withhold information on a number of issues based on objections of privilege or trade secrets, and that Petitioner was refusing to produce a number of documents based on these objections. That is not true, all such objections related solely to the Velocity document since at that time there were no other license agreements in question that could pertain to quality control, assignments, or etc. Hence all of Respondent's interrogatories and all of Respondent's requests for documents -- insofar as they pertained to such questions as quality

control, assignments, etc. -- solely related to the Velocity document since that was the only document that had been requested that was in Petitioner's possession at that time.

31. Thus the only possible sense in which Petitioner was "demonstrating determination not to cooperate and to deny information" was solely in regard to the single Velocity document. And Petitioner not only believed in good faith that it had good reason not to produce the document or reveal information relating to its contents, but at the time I sincerely believed that Petitioner was *obliged* by law to object on the grounds of privilege and trade secrets given the presence of a clause that required a Court Order before the document or its contents could become part of any proceeding.

32. And to be further clear, there were no other license or settlement documents in Petitioner's possession at the time in question, nor did Petitioner have possession of any other document Respondent had asked for but which had not been produced in the 852 page bundle served November 17, 2015. Petitioner did not, for instance, possess any research reports, or similar, that it was withholding based on privilege, as Respondent tried to mislead the Board into believing was the case.

33. In regard to Petitioner leaving in general boilerplate objections relating to privilege and trade secrets (page 2 of the Board's June 2, 2016 Final Decision), I repeat again that these objections were only left in so as to reserve Petitioner's technical rights (such as they may be, whatever they may be) and to preserve whatever grounds may be applicable in the instance where a document has a clause calling for a Court Order before production or disclosure.

34. In regard to the Board's statement that Petitioner objected to all but two of Respondent's interrogatories on the grounds of confidential trade secret information or other privileged information, this is only technically true since all I was doing by including those objections was

preserving Petitioner's right to that kind of objection given that the Board had only asked me to remove references to merit-based objections. Petitioner was not actually relying on these privilege related objections to withhold any information or any document, other than in regard to the sole Velocity document, as is clear when the Board goes on to read the actual responses which show in nearly all cases the objection was stated but not actually relied upon.

35. The Board goes on to assert that Board rules and procedures provide that confidentiality objections are improper because the Board's standard protective order governs the exchange of such information and documents. The Board then states in its Decision that a party asserting a claim of privilege must describe the nature of documents and information being withheld.

36. With sincere respect, the Board is surely in error in stating that all objections based on confidentiality are improper. TMBP 402.01 states in regard to general scope of discovery:

*"Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any **non**privileged matter that is relevant to any party's claim or defense — including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter."* (my emphasis)

Thus it is built in to the basic guidelines as to the scope of discovery that some information and documents are outside of the scope if they are privileged.

37. And in regard to the specific examples provided by the Board in TBMP 414, the following clarifies that there is information, and there are documents, that can be considered confidential and thus not subject to discovery:

*TBMP 414 (3) The classes of customers for a party's involved goods or services are discoverable. In contrast, the names of customers (including dealers) constitute confidential information, and generally are not discoverable, **even under protective order**.* (my emphasis)

Thus there are instances where information and documents may be withheld and not discoverable even under protective order. And while the TMBP is not exhaustive in its list of examples in sections 404 or 414, there are sufficient guidelines given by the Board to indicate that there may be a number of valid objections based on confidentiality where the Board's protective order does come into play.

38. It was my opinion, based on a good faith attempt to carefully consider the contents of sections 404 and 414 that this particular document, with its requirement that a Court Order be required before its contents are revealed, was just such a valid use of a confidentiality and privilege objection. It is possible that I was in error, but if I was there was no bad faith intent on my part: on the contrary, what I did was based solely on good faith and a sincere attempt to properly interpret Board rules and procedure.

39. The Board is critical that I did not describe the nature of the document (and hence the information therein) that I was withholding based on privilege and confidentiality. However, on the one hand that is not true since the nature of the document was fully described in Petitioner's privilege log (see **Exhibit TL3** hereto), and also the nature of this particular document, and thus the basis of the objections, was very well known to Respondent, making explication in detail within the discovery responses redundant.

40. Neither I personally, nor Petitioner corporately, thus displayed any disregard for rules and procedures of which I/it was well aware, and thus there was no "demonstration of Petitioner's intent to delay proceedings and thwart Respondent's discovery of relevant information in violation of Fed. R. Civ. P. 26(g)(1)(B)(ii)" as the Board asserts in its June 2, 2016 Decision (at the bottom of page 3, and top of page 4).

41. Petitioner acted in good faith when it continued the objections since they only pertained to this one Velocity document which called for a Court Order to be made. Reading of Board rules and consideration of Board procedure at the time, I concluded in good faith that Petitioner was obliged to withhold this information and this document. If I was wrong in that decision, then it was in good faith with no willful intent to disregard the Board's rules or procedures, and certainly was not done with the intention of deliberately thwarting Respondent's discovery.

42. Proof that there was no bad faith or deliberate attempt to thwart Respondent's discovery is found in the fact that when Respondent pointed out its continued concerns for the first time within the body of its Motion for Sanctions (and *never* in any inter-parties communication), I immediately caused the further revised amended discovery responses to be served on December 5, 2015 **which dealt with all of Respondent's concerns** (and removed all withholding of information or documents based on privilege or confidentiality) other than the single issue of still withholding the Velocity document itself.

43. At that time -- November/December 2015 -- I still sincerely believed that Petitioner was obliged by law, given the clause about a Court Order requirement, to withhold that document. Petitioner was later advised differently, and on March 7, 2016 Petitioner also produced under the Board's protective order the last remaining document that Respondent had requested (the Velocity document).

44. Thus neither I personally nor Petitioner corporately at any time sought to willfully disregard any board order or rules or procedures by withholding any information regarding the Velocity document or the document itself.

45. I also note that the Board is in error in stating that Petitioner intentionally caused any significant delay whatsoever. When on October 13, 2015 Mr. Barritt brought to my attention the

areas of Petitioner's October 5, 2015 amended discovery responses that he still had issues with, I promptly created and served Petitioners further amended responses on October 19, 2015. With respect that is virtually no delay at all.

46. The delay from October 19, 2015 to November 17, 2015 was caused solely by Respondent failing to draw any ongoing concerns about Petitioner's discovery responses to Petitioner's attention. Then, when Respondent finally drew its further concerns to Petitioner's attention in the body of its Motion for Sanctions filed November 17, 2015, I promptly set about drafting a yet further revised amended set of discovery responses that sought to fully address all of Respondent's remaining concerns. Thus was drafted with all possible speed and served on Respondent on December 5, 2015, just relatively days after Respondent brought the need for further revisions to discovery responses to Petitioner's attention. Thus Petitioner caused no significant delay here, either.

47. From the moment Respondent filed its Motion on November 17, 2015 until the Board issued its Final Decision on June 2, 2016, the proceedings were stayed pending the outcome of Respondent's Motion. Consequently, whatever Petitioner or I personally am accused of doing between November 2015 and June 2016, nothing could, or did, cause any delay whatsoever since there was a stay in place.

48. **Verification of Amended Interrogatory Responses.** On page 4 of its Final Decision the Board alleges that Petitioner failed to verify its amended interrogatory responses as required by Fed. R. Civ. P. 33(b)(3) (31 TTABVUE 30-49). However, I believe the Board is in error since Petitioner did sign (electronically) its amended discovery responses (at page 48, of 31 TTABVUE). According to the TBMP, signature is all that is required and a verification per se is not required since it is implied by the signature:

FRCP 26(g) (1) Signature Required; Effect of Signature. *Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name — **or by the party personally, if unrepresented** — and must state the signer's address, e-mail address, and telephone number. By signing, an attorney **or party** certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:*

(A) with respect to a disclosure, it is complete and correct as of the time it is made; and

(B) with respect to a discovery request, response, or objection, it is:

(i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;

(ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and

(iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action. (my emphasis)

The Board does not clarify why it believes Petitioner did not verify the amended discovery responses when they were clearly signed electronically. From a review of Board rules and procedures, I cannot see a reference to only hand written signatures being acceptable, and I note that in the various proceedings I am involved in before the Board (6 currently) representatives of other parties often use an electronic signature with no objection from the Board. I also see no use of an actual "verification" as such being generally used -- even by Mr. Barritt for Respondent on his party's discovery responses.

49. However, since the Board has left Petitioner to guess why the Board believes the responses were not verified, I further note the TMBP rule in the event there is no signature (no verification), which states:

(2) Failure to Sign. *Other parties have no duty to act on an unsigned disclosure, request, response, or objection until it is signed, and the court must strike it **unless a signature is promptly supplied after the omission is called to the attorney's or party's attention.** (my emphasis)*

Since this is the first opportunity that Petitioner has to correct this alleged "error" since it was first called to Petitioner's attention in the body of the Board's June 2, 2016 Final Decision, I attached hereto (**Exhibit TL4**) a last page of each of the amended and further amended discovery responses, this time specifically verified and signed by hand. Under the circumstances, these verifications should be considered promptly supplied -- since this is the first opportunity to do so -- and hence Petitioner should not be penalized or sanctioned at all for such failure to verify.

50. At page 4 of the Board's June 2, 2016 Decision, the Board makes the false statement that Petitioner produced no documents. This is of course entirely untrue and in fact on the same day that Respondent filed its Motion for Sanctions, and well before Petitioner became aware that such a motion existed, Petitioner served on Respondent a very large bundle of 852 pages of documents -- which comprised of every document requested by Respondent, with the sole exception of the Velocity document, and with no document being withheld from production due to any objection raised or noted by Petitioner in its discovery responses.

51. The Board further states that Petitioner responded "only that it would produce responsive documents without specifying the date or place of production." With respect, the Board misunderstood the true facts surrounding the agreement for production between the parties. First, the parties had agreed on production via mail (that is how Respondent served its documents on Petitioner in February 2015), and thus it would have been inappropriate for Petitioner to state a date or place. Second, Respondent was well aware through the inter-parties correspondence that Petitioner while indicating it would produce documents soon, at that time had none of the requested documents available to produce. Thus it was impossible for Petitioner to state even a time of anticipated mailing of documents.

52. Respondent understood fully from the inter-parties correspondence, including Petitioner's Virginia based attorney's correspondence with Respondent (exhibited to the Motion filings by both Respondent/Petitioner), that Petitioner was still waiting on its licensee, Velocity Micro, to produce the documents in question, and was still searching for missing documents that would be responsive to those requested. Thus at the time of serving the amended discovery responses, there were no documents to produce, only the anticipation or receipt or discovery of documents, the timing of which receipt or discovery could not be stated with any more accuracy than stating in good faith, "soon."

53. For this reason, when also in page 4 the Board states that by failing to indicate a place and date for production Petitioner was committing a merit based objection, which was in breach of the Board's Order, this was in fact not true. There was then no effective merit-based objection in violation of Prior Board Order I.

54. I note that the only examples the Board gave of where it believed Petitioner had failed to comply with Prior Order I on reconsideration are clearly not failures to comply with the Board's order. Rather, they are misunderstandings on the part of the Board, caused in sizable part by the hyperbole and rhetoric of Respondent that mislead the Board as to the true facts of this case.

55. There were then no grounds at all for the Board to sanction Petitioner as it states on page 4 of its Decision, and certainly no grounds that rise to the level of justifying the extreme sanction of judgment as the Board wrongly concluded. Most pertinently, there was no bad faith withholding of discovery information or documents, and no significant delay caused, and no willful failure of Petitioner to follow Board Prior Order I or *willful* failure to follow Board rules and procedures.

56. The Board confirms in its Decision that a sanction of judgment should not be granted where a party did not clearly act in bad faith, where there was no willful disobedience of Board orders, where there was no great length or pattern of repeated significant delay, where a party was not adequately warned, and that the Board should take into account the reasons for non-compliance and the effectiveness of lesser or alternative sanctions. Here, I *sincerely* never did act in bad faith, and as I believe I have shown I never willfully disobeyed any Board order. Petitioner caused virtually no delays at all. Reviewing the history of this case, one can see that it was Respondent who repeatedly caused significant delays by repeatedly filing motions and by taking over 8 months from August 2014 to February 2015 to even commence proper response to Petitioner's discovery requests.

57. I accept that the Board did state that there was the potential for a sanction of judgment as an extreme possibility, but nowhere was there any warning by the Board that Petitioner's actions were likely to be considered sufficiently egregious as to warrant that extreme sanction. Indeed, the Board's Final Decision dated June 2, 2016 is the first time that Petitioner is learning that the Board viewed certain actions by Petitioner to be so egregious -- there being no opportunity to correct or amend prior to the final decision being already rendered. And, as can be seen herein, the most egregious infractions the Board believed Petitioner had been guilty of in fact never actually occurred. The Board only falsely believed such disobedience had occurred because (a) the Board misunderstood the facts, (b) the Board lacked certain key facts, and (c) Respondent deliberately misstated the facts and the record so as to convince the Board that egregious willful disobedience had occurred when it had not.

58. The Board's misunderstanding was enhanced by the unfortunate "crossing over" of Petitioner's service of the substantial discovery production satisfying Respondent's requests on

the same day as Respondent filed a Motion that unknowingly falsely depicted Petitioner as not having produce any documents. I do not allege that Respondent deliberately mislead the Board when it falsely stated in its Motion that Petitioner had not produced any documents or that Petitioner had withheld documents and information (contained in the documents). But I do find it highly suspicious that Mr. Barritt was fully aware that I was to send him the sizable bundle of documents on or about November 17, 2015 and yet he chose that day at about the same time as he was notified of Petitioner's production to file a Motion that so loudly proclaimed falsehoods about Petitioner thwarting Respondent, when nothing could be further from the truth.

59. Finally on the topic of the Motion for Sanctions, I note that the Board decided not to consider Respondent's in the alternate Motion to Compel having ruled on the Motion for Sanctions. However, I note that had the Board ruled on the Motion to Compel it surely would have been obliged to have ruled that the Motion to Compel was denied given that by the time the Board rendered its decision on June 2, 2016 Petitioner had fully complied with all of Respondent's requests for both information and document production. by March 7, 2016, let alone by June 2, 2016, there were no remaining outstanding discovery disputes at all, and no outstanding issue that Respondent could possibly fairly suggest Petitioner had not fully and acceptably dealt with.

IN REGARD TO THE NOTICE TO SHOW CAUSE

60. The basis for the Notice to Show Cause was that the Board had ordered in its Prior Order II of January 30, 2015 that Petitioner could only file an unconsented motion after first obtaining verbal permission of the Board. And it was contended that Petitioner had willfully

disregarded this Order when it filed an Amendment to a Motion response on December 8, 2015 and again when Petitioner allegedly sent an *ex parte* email to the Board on January 8, 2016.

61. First and foremost, **Petitioner did not send an *ex parte* email to the Board on January 8, 2016.** I deeply regret that when the Board stated in its Notice to Show Cause that I had sent an email *ex parte*, and seeing the Board's exhibited email that certainly *appeared* as if it had been sent *ex parte*, I made the error of assuming the Board was correct. For this reason in Petitioner's response to the Notice to Show Cause inadvertently perpetuated the misunderstanding that the email in question was sent *ex parte*.

62. At the time, in January 2016, I had been certain that I had copied the email in question to Respondent, since this is my usual practice. What I failed to do, for which I apologize profusely, is check my sent items to ensure that the email in question really was not copied to Respondent. In preparing to file the instant Motion appealing the Board's June 2 Decision, I discovered that I had copied Respondent with the January 8, 2016 email, but that I had made the clerical error in my haste of putting Respondent's email address in the "Bcc" (blind copy) line of the email, rather than in the usual "cc" (open copy) line. The January 8, 2016 email was thus copied to Respondent per the Board's Prior Order II, despite the surface appearance that it was sent *ex parte*. Thus there was no failure to adhere to the Board's order.

63. That said, although I was certain that I had followed Petitioner's usual practice of copying the other party with emails to the Board (and had indeed done so), I sincerely had not recalled that this was a *requirement* that had been ordered by the Board in Prior Order II. This is clearly suggested by my email of January 8, 2016 exhibited to the Board's Notice, where in the opening lines I (mis)state that I am aware the Board wishes me to obtain verbal approval by telephoning the Board Attorney (clearly I had confused this matter with the parallel matter that

calls for that requirement). At the time I was involved with six (6) actions before the Board, 4 oppositions, another petition and this petition. In four of the cases Petitioner was not required to seek verbal approval of the Board before filing an unconsented motion. Of the remaining two actions, the other action also called for Petitioner to first gain verbal approval before filing any unconsented motion, but in that parallel proceeding occurring at the same time as this one, the requirement was a literal obligation to telephone the Board's Interlocutory Attorney and verbally ask for the verbal permission. Such verbal request in that parallel case before the Board was permitted *ex parte* with no requirement that Petitioner first email the Board and the other party to set up a hearing at which the request for verbal permission would be discussed.

64. By last December, and this past January, I had thus become confused between all the proceedings before the Board that I was handling, and the lack of a logical reason for a difference between what the Board requires, or does not require, regarding the filing of motions. Thus by December 8, 2015, and by January 8, 2016, I had sincerely forgotten that the Board ruled in its Prior Order II that Petitioner was to email to ask for a hearing, and to copy the other party with the email.

65. Only when the Board issued its Notice to Show Cause did I review the Prior Order II and notice that in small print -- in a footnote, not in the main body of the Order -- the instruction to use email in this way to gain the verbal approval. What I had recalled was what is stated in the main body of Prior Order II, which is simply that verbal approval is required before Petitioner files any further unconsented motions.

66. The usual meaning of being required to seek verbal approval is simply that -- to telephone and ask for verbal approval -- in contrast to seeking written approval that one might do, say, by sending an email to the Interlocutory Attorney. Given that in the parallel proceeding

before the Board all Petitioner was required to do was telephone the Interlocutory Attorney for verbal approval, that is what I recalled was to do done in these proceedings, too.

67. Indeed, I note that in the Board's April 6, 2015 decision (20 TTABVUE) the Board Attorney confirms that I requested that going forward Petitioner would like an automatic suspension of proceedings in the event that Respondent requests a hearing to decide whether or not verbal approval will be given to Petitioner filing a motion. As can be seen in what the Interlocutory Attorney decided, she merely denies this request on the grounds that it might cause unwelcome delays. But she does not state -- as surely she should have -- that the Board's Prior Order II had ruled that a hearing would take place regardless, and not only if Respondent asks for a hearing. The inconsistency of the Interlocutory Attorney's response, and the fact her April 6, 2015 decision was at odds with the footnote of her January 30, 2015 Order, further confused me.

68. I was then yet further confused when in October 2015, not realizing requirement hidden in the footnote in Prior Order I, or forgetting by that point that it had been made due to the contrary orders in parallel Board cases, I telephoned the Interlocutory Attorney on September 30, 2015 to ask for her verbal approval that Petitioner file an unconsented motion. This was the method I was accustomed to doing with the other Board case. I thus made *ex parte* contact via telephone with the Interlocutory Attorney on September 30, 2015 to request permission to file a motion. Rather than reminding me of her January 30, 2015 order to not make such *ex parte* contact, instead the Interlocutory Attorney initiated *ex parte* contact with me on October 5, 2015 and in that call she granted me the verbal approval to file a motion should Petitioner wish to do so (see Exhibit TL5 hereto showing the outgoing and incoming calls to and from the Board's Interlocutory Attorney).

69. Thus by December 2015 I had every reason to be very confused as to what the Board's true order was given the contradictory behavior, actions and statements of the Interlocutory Attorney, and given I was involved in five other Board issues, none of them requiring me to seek a hearing via inter-parties email prior to gaining verbal consent to file a motion. I concede that in an ideal world I would have taken the time to double check the Board's Prior Order II of January 30, 2015, but in the moment I believed I had confirmation from the *ex parte* contact with the Interlocutory Attorney in October 2015 that meant I would have no reason to go back and search the minutiae of the footnotes of prior orders, a footnote I may have overlooked at the time or quite reasonably have forgotten existed.

70. On October 5, 2015 to the best of my recollection in my *ex parte* telephone conversations with the Interlocutory Attorney I gained verbal approval for Petitioner to file an unconsented motion to seek compel discovery and to seek sanctions against Respondent.

71. When I filed the additional single page addendum to Petitioner's reply to motion on December 8, 2015, I most certainly did not intend that single page to be interpreted by the Board as an unconsented motion. But **if the Board did interpret that document as a motion (which it appears it did) then Petitioner did have verbal approval to file such a motion.**

72. The single page addendum filed December 8, 2015 was poor judgment on my part, since in hindsight it was out of time to be considered (the prior filing was just within the deadline), and the addendum had to be given no consideration since the paper it was seeking to add to was already at the page limit for a response. Thus for at least two reasons, the Board should have given no consideration to that December 8, 2015 filing, including no consideration as to how it was interpreted -- whether as the addendum it was titled as, or whether as an unconsented motion.

73. Although it was poor judgment to file that December 8, 2015 paper, it sincerely was my intention in do so to merely invite the Board on its own motion to consider sanctioning Respondent for abuse of process. But as I clarify above, if the Board wishes to interpret that single page document as an unconsented motion -- even though it was not intended as such -- then Petitioner was granted verbal approval to file such a motion.

74. For all of the above reasons, then, Petitioner did not fail to adhere to Prior Order II when it filed the December 8, 2015 document, however ill conceived that document may have been. Its filing did not breach Prior Order II.

75. On page 6 of the Board's June 2, 2016 Decision, the Board summarizes the six factors that it should take into account when considering giving the extreme sanction of judgment: (1) bad faith conduct; (2) willful disobedience of Board orders; (3) the length of delay or clear pattern of delay; (4) due warning that sanctions may be entered; (5) the reasons for non-compliance; and (6) the effectiveness of lesser or alternative sanctions.

76. In support of the contention that Petitioner acted in bad faith and with willful disobedience, the Board notes that it believes Petitioner deliberately sought to pass off its one-page document filed December 8, 2015 as an "addendum" when in fact the Board posits it was intended by Petitioner as a kind of "back door" motion for sanctions that sought to deliberately circumvent the Board's order.

77. There is of course, as clarified above, no truth whatsoever to this assertion by the Board. First, if it was intended by Petitioner to be an unconsented motion for sanctions, then it was spectacularly ill conceived, since titled as it was it constituted a document for which there were at least two reasons the Board would give it no consideration whatsoever (it was filed out of time to be an addendum, and could not be considered since it would take the Reply over the limit to

11 pages rather than the permitted 10). If Petitioner had been trying to file a motion for sanctions then it would either have reworded and reformatted its timely filed December 7, 2015 Reply to Motion, or Petitioner would have not risked the document being given no consideration by filing it as a stand alone document unrelated to the Reply that was due by December 7, 2015.

78. But as clarified above, the document in question was simply an ill conceived filing, one that genuinely was intended merely to be an invitation to the Board to act on its own motion, and in any event should have been given no consideration. But even if the document is designated as a motion by the Board, then Petitioner had been given verbal approval to file such a motion, so there was no intentional, willful, bad faith, disobedience of the Board's Prior Order II.

79. The Board then went on to list a number of what it believes are further examples of Petitioner failing to adhere to Board orders, rules or procedure. I will deal with each of these accusations in turn.

80. **The first accusation** is that Petitioner filed an untimely motion for sanctions based on Respondent's purported refusal to participate in the discovery conference (5 TTABVUE and 8 TTABVUE 2). What the Board overlooks, because it was unaware of the fact at the time of writing the Decision, is that prior to filing the Motion for Sanctions I telephoned the Interlocutory Attorney to complain that Respondent was persistently refusing to participate in a discovery conference, and asked the Board for advice as to what action Petitioner should take. I was told by the Interlocutory Attorney that Petitioner should ask the Board to get involved and the Board would take steps to encourage, and perhaps specifically order, Respondent to be compliant with discovery requirements.

81. From the telephone conversation I had with the Interlocutory Attorney I gained the impression that the mechanism Petitioner should use to get the Board involved in the issue was

to file a Motion for Sanctions. However, only when the Board ruled on the matter did I discover that I had misunderstood what the Interlocutory Attorney was saying to me. This was a simple good faith unintentional failure to follow Board rules, and given the circumstances involving a simple misunderstanding of the advice given Petitioner, should not in all fairness be an issue that Petitioner is penalized for, and certainly not an issue that should be fairly comprise a basis for the ultimate sanction of judgment.

82. **The second accusation** on page 7 of the Board's Decision is that Petitioner filed a motion to compel and to test the sufficiency of responses to requests for admission before the deadline for Respondent to respond (6 TTABVUE and 8 TTABVUE 2).

83. While Petitioner was technically a few days early filing this motion, there are valid and significant mitigating circumstances that mean, I believe, that this issue should not be considered as part of a list of examples of bad faith or *intentional* failure to adhere to Board rules.

84. As was pointed out to the Board at the time, certainly Petitioner ideally should have waited a few more days before filing the motion. But in Petitioner's defense, Respondent had written a letter to Petitioner in August 29, 2014 stating in effect that it was not going to serve any timely responses because it disputed that there had been any proper service of the discovery requests (see 9 TTABVUE 12).

85. I have no doubt whatsoever that had Petitioner not filed the Motion when it did, slightly before Respondent's deadline to respond, then Respondent would have let the deadline pass just as it stated it would in its letter of August 29, 2014. I appreciate that the Board and Petitioner will never know with certainty, but I submit that this is very likely what would have happened had Petitioner not slightly jumped the gun with its motion.

86. I would also ask the Board to take note of the fact that Petitioner's intent in filing this motion was to *hasten* discovery, not to cause any delays. Any delay caused was thus an entirely unintended consequence that Petitioner did not anticipate.

87. Indeed, the fact that Respondent's so-called "timely" discovery request responses hurriedly served only when the Motion had been first served were full of simple boilerplate objections shows that Respondent had no real intention of properly participating in discovery (see 9 TTABVUE 12).

88. As the Board can see, Respondent gave even worse examples of the boilerplate responses that the Board criticized Petitioner for giving. It would be a significant injustice if Petitioner were to have the sanction of judgment confirmed against in part of the suggestion it was less than compliant with discovery responses, when clearly Respondent was far less compliant in its discovery responses than Petitioner ever was alleged to have been.

89. Indeed, further context for appreciating why Petitioner filed its motion early is that it then took a further 8 months from August 2014 to February 2015 before Respondent finally served on Petitioner amended discovery responses that even came remotely close to being proper responses that any party would find acceptable. Thus it was Respondent who put at least an 8 month delay into the process, and in hindsight while Petitioner should have waited a few more days before filing its Motion to Compel, Petitioner's instinct was correct that Respondent was indeed doing all it could to thwart Petitioner's genuine attempts to gain discovery of information and production of documents it was entitled to.

90. **The third accusation** is that Petitioner filed an amended motion to compel notwithstanding a suspension order that prohibited such a filing (12 TTABVUE 1-2).

91. This accusation is grossly unfair -- when Petitioner filed its amended Motion to Compel at 9 TTABVUE, Petitioner was unaware at that time that within the prior 24 hours the Board had suspended proceedings and asked that no documents be filed not germane to the pending prior motion. I have searched the emails received by Petitioner at that time, and can see no incoming email that informed Petitioner of the September 24, 2014 suspension of proceedings.

92. The Amended Motion to Compel which appears at 9 TTABVUE with a date of September 25, 2014, is in fact dated September 23, 2014, the day before the Board suspended proceedings. I drafted the Amended Motion on September 23rd but due to technical issues I encountered, as I recall it was not until late on September 24th that I was able to file the document with TTABVUE. I believe because of the time difference (Petitioner is in California), the filing was technically then dated as September 25, 2014.

93. But I am sure that when I filed the Amended Motion I had no knowledge that the Board had suspended proceedings and that the first time I became aware of the suspension was some days later when the Board's decision arrived in the mail.

94. There was thus no intentional filing of a motion while proceedings were suspended, and thus no willful or intentional disregard for a Board order.

95. **The fourth accusation** is that Petitioner embedded an unconsented "request to extend discovery deadlines" without first gaining Board approval (21 TTABVUE and 28 TTABVUE).

96. In Petitioner's defense, Petitioner stated in the conclusion of its filing (at 21 TTABVUE 17) that its filing should *only* be taken as a request for extension of time if the Board ruled in Petitioner's favor. In fact the Board did not rule in Petitioner's favor, thus clearly by definition Petitioner did not request any extension of time. Thus although there was a danger that what Petitioner filed could have amounted to an unapproved unconsented motion, in fact there was no

unconsented motion and there was then no breach of Prior Order II. I concede the wording of the document's conclusion was poorly crafted, and there was a danger it could have amounted to an unauthorized request for extension of time, but in fact in the event it did not stand as a request because the Board did not rule in Petitioner's favor.

97. **The fifth accusation** is that Petitioner served interrogatories, document requests and requests for admission during a suspension of the proceeding (24 TTABVUE and 28 TTABVUE).

98. At the time, in May 2014, I believed, wrongly as it happens, that suspension of proceedings does not toll the time to serve and respond to discovery requests. Thus at the time I believed it was acceptable to serve further discovery requests. This was simply inadvertence since I was unaware that suspension also tolled time for serving such new requests.

99. But it would be grossly unfair to penalize Petitioner at all for serving discovery requests during suspension of proceedings since Respondent did the exact same thing during suspension in these proceedings..

100. As can be seen in the letter from Respondent to Petitioner, Petitioner concedes that it should not have served its further set of discovery requests while the proceedings were suspended and specifically states that it will re-serve the requests when the suspension is lifted.

101. It would thus be incredibly unfair to penalize Petitioner in any way, let alone have it be part of justification for the ultimate sanction of judgment, for mistakenly serving new requests during suspension when Respondent did the exact same thing.

102. **The sixth and last accusation** was that Petitioner failed to include proof of service in some filings (10 TTABVUE and 29 TTABVUE).

103. Yes, on two occasions, and as far as I can see just two, Petitioner did overlook attaching the proof of service to its filing. I did though ensure that in both cases the proof of service was attached to the version that was served on Respondent. Thus while I deeply apologize for omitting the proof of service off of what was filed with the Board, I can confirm there was valid proof of service in both (indeed, *all*) cases.

104. In summary, of the six accusations made by the Board to support a sanction of judgment based on bad faith or intentional disregard for Board orders and rules, I submit that these do not amount to a fair justification for penalizing Petitioner at all, let alone justifying the ultimate sanction of judgment.

105. On page 8 of the Board's Decision the Board states falsely that the proceedings were delayed "several months" for briefing of the Show Cause Order. However, this is not true, since all briefings relating to the Order were made while the proceedings were already suspended since November 17, 2015 pending the outcome of the Motion for Sanctions. The Board further notes that the filing on behalf of Petitioner at 46 TTABVUE included a request for extension of time for up to 60 days.

106. As mentioned in the further filing on behalf of Petitioner at 49 TTABVUE, Petitioner was tricked into using an attorney for the filing of the document at 46 TTABVUE that was not approved by Petitioner prior to being filed, and which contained horrendous errors that any competent trade mark attorney would never have made. Clearly, there is no possibility that Petitioner would have authorized that attorney filing the document at 46 TTABVUE to make an unconsented request without approval for an extension of time in a document that was purportedly responding to an accusation of Petitioner making such unapproved requests! Not least, as was pointed out in 49 TTABVUE, since discovery had ended and there was no possible

reason why Petitioner would desire any such extension of time. In fact, my mind boggles that why on earth that attorney believed it was appropriate to add such wording to the document.

107. In footnote 9 on page 9 of the Board's Decision, the Board states that being tricked by an attorney who purports to be an expert and who filed a document without permission is not a basis for Petitioner not to be liable for what that attorney filed. With deep respect, I fully appreciate that it is the general understanding that a party has a shared duty to communicate and prosecute a case and under normal circumstances, a party perhaps ought to be responsible for what its attorney states in a filing done on its behalf. But here we have a case of fraud on the part of the attorney, and a document that was not approved, one which was not even formatted as any competent attorney would do, and therefore a rare exception where what happened was not in Petitioner's control.

108. If an attorney refuses to communicate and files a document without a party's permission that contains a request that it is obvious the party could not possibly have approved be included, then in fairness and equity the usual position that the party be responsible should be set aside in this unique instance. It would be grossly unfair for Petitioner to be held responsible for the absurd mistake that this attorney made, a mistake that there is surely no reasonable basis for believing Petitioner approved of.

109. On page 9 of the Board's Decision the Board expresses doubt that Petitioner's assertion that it became confused has merit. But, hopefully, the above clarifications have served to help the Board to appreciate that I was very confused by what the Board's requirements were. I will not repeat what I have already covered above, but I genuinely believe that it would be very unfair to take the narrow view that simply because of the requirement buried in the footnote of the January 2015 Prior Order II it should be deemed undeniably clearly conveyed to Petitioner.

110. What happened subsequently, with the Board Interlocutory Attorney taking part in and instigating *ex parte* communication, and with the conflicting rules in place in the other matters I was also handling before the Board, should be taken into account as mitigation. That said, neither the December 8 nor the January 8 purported failures to obey the Board's orders were in fact instances of disobedience. It is thus an unfair simplification to state, as the Board does, that "Petitioner ignored a straightforward instruction." That is not what happened. Moreover, it is now clear that Petitioner did not argue its case to impugn Respondent and impermissibly influence the Interlocutory Attorney by a purposely sending an *ex parte* email, rather Respondent was copied with the email.

111. As to the Board's conclusion on page 10 of its Decision that Petitioner repeatedly showed "callous disregard" for Board rules and orders, that conclusion is not justified by the true facts as are now laid out before the Board. I do not claim that Petitioner's prosecution of this case was without flaw, but the various points at which Petitioner fell short of perfect prosecution of the case, were in the main excusable or understandable when the circumstances are taken into account. At worst case, Petitioner's less than perfect prosecution of the case to-date, amounts to in general a collection of misunderstandings and minor, largely justifiable, errors none of which were intentional, willful disobedience of Board orders or rules or Board procedure.

LESSER OR ALTERNATIVE SANCTIONS

112. With deep respect, the Board mistakenly concludes that the sanction of judgment is the only fitting sanction -- both in regard to the Motion for Sanctions and the Notice to Show Cause. With the true facts now being before the Board, and with a number of misunderstandings now hopefully cleared up, with deep respect I submit that what the Board is left with is a number of

less than perfect examples of prosecution of this case, but nothing, either individually or collectively, that justifies the ultimate sanction of judgment.

113. Federal Rules of Court, as well as the Board's Rules, both call for a matter to be decided on its merits wherever possible, and that only in extremely rare cases should a sanction of judgment be issued that denies a party its right to have the matter heard on the merits. I submit that here it would be a travesty of justice that Petitioner be denied its right to have this case heard on its merits.

114. Petitioner's likelihood of prevailing in this case when it is heard on the merits is near certain, whereas Respondent's likelihood of prevailing is negligible to non-existent. In this unique case, the Board has the ability to scan the 852 pages of evidence that Petitioner served in a timely manner on Respondent on November 17, 2015. Even a casual perusal of these documents reveals that they contain a sworn declaration from the CEO of Petitioner's licensee Velocity Micro that confirms Petitioner, through this licensee, has sold several millions of dollars of the same goods utilizing the same trademark as in the subject Respondent's registration, and that such sales took place in US commerce on a continuous basis for at least a decade prior to Respondent's first ever use either in the US or in any foreign territory.

115. Thus there is virtually no possibility that if this matter is heard on the merits that Respondent will be able to overcome Petitioner's clear solid claim to priority of rights for the same mark and the same goods in US commerce.

116. Added to this there is the fact that when the USPTO permitted Respondent's mark to go forward to registration, it overlooked the fact that there are two earlier applications for the same mark for essentially the same goods, and already a registration for the same mark for essentially

the same goods from over a decade earlier, all three of which stand as incontrovertible proof that Registrant should not be permitted to continue to own the instant registration.

117. I thus submit that the ultimate sanction judgment is not remotely fair in this particular case where any missteps by Petitioner were not as egregious as the Board believed they were when it issued its Decision, and in which Petitioner would be being denied a fair hearing on the merits in a case where it is almost impossible for Respondent to prevail, or for Petitioner to not prevail.

I conclude I thus submit that there have to be more appropriate, more fitting, lesser sanctions than judgment. For instance, surely Petitioner addressed all of the Board's key concerns by transitioning from being self represented to being represented by counsel. That lesser sanction, that Petitioner must be so represented going forward, would address all of the concerns the Board may still have regarding Petitioner adhering to Board rules, orders and procedures. And I repeat the notice at the start of the attached Motion, that Petitioner fully intends to be represented by counsel again when the proceeding is recommenced and set for trial. Petitioner is only in *pro se* again for the sole purpose of filing this motion since the matters concerned are so complex, and because I as CEO of the Petitioner are best equipped to draft and file this motion having the best knowledge of the case. And, because it proved impossible to identify an attorney within the 30 days permitted to file a Motion for Reconsideration of Decision on Motion who would be able to get sufficiently up to speed on the issues, and also be able to draft and file a timely motion.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this 1st day of July, 2016, at Pasadena, California.

By: /s/ Tim Langdell
Dr. Tim Langdell

EXHIBIT TL1

FISH & RICHARDSON P.C.

Frederick P. Fish
1855-1930

W.K. Richardson
1859-1951

March 24, 2014

Via Email
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Tim Langdell
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Re: EDGE Trademark Cancellation No. 92058543
Discovery Conference
79631-0019PP1

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202 783-2331

Web Site
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us fulfill our discovery conference obligations in
er 37 CFR Section 2.120(a)(2) applicable to
and Appeal Board.

nses are clear from its answer to the
viation or arbitration nor utilize the
time.

Defenses

proposal in my email to you

with the initial disclosure

ments stored in electronic
electronic format in a readily
website.

FISH & RICHARDSON P.C.

Page 2

c) Privilege Logs: We propose that the parties dispense with the production of privilege logs.

d) Introduction of Evidence: We do not have any proposals regarding the introduction of evidence beyond the procedures established by the Trademark Trial and Appeal Board, with the exception that we propose the parties stipulate pursuant to 37 CFR 2.123(b) that testimony may be entered by affidavit or written declaration under 37 CFR 2.20.

e) Protective Order: We do not have any proposed changes to the Board's standard protective order.

I look forward to hearing from you.

Sincerely,


Keith A. Barritt

EXHIBIT TL2



Mr Keith A. Barritt, Esq
Fish & Richardson P.C.
1425 K Street, N.W.
11th Floor
Washington, DC 20005

April 7, 2014

Via First Class Mail

**Re: EDGE Trademark Cancellation Action in the U.S.
Your Ref.: 29631-0019PP1
Discovery Conference**

Dear Mr Barritt:

Further to your letter of April 3, 2014. You appear to have mis-read or misunderstood our March 28, 2014 letter in regards to the question of the production of privilege logs. We were not suggesting we did not agree to dispense with them (as you proposed in item (c) of your March 24, 2014 letter. On the contrary, we were merely asking why you were proposing this in case there was some particular issue that should be brought to our attention. Apparently, there is not.

We thus hereby agree to your proposal of March 24, 2014 to dispense with the production of privilege logs.

Kind regards,

A handwritten signature in black ink, appearing to read "Tim Langdell". The signature is stylized with a large initial "T" and a long, sweeping underline.

Dr Tim Langdell
CEO.

EDGE Games, Inc.,

530 South Lake Avenue, 171, Pasadena, California, 91101

T: 626 449 4EDGE F: 626 844 4EDGE W: www.edgegames.com E: corp@edgegames.com

EXHIBIT TL3

Petitioner Edge Games Inc Privilege Log
March 3, 2015

Cancellation No. 92058543

Document Type	Author	Date	Content	Privilege Asserted
Printed	Velocity Micro Inc and Edge Games Inc	11/26/2008	Settlement Agt & License	Document contains requirement of a Court Order before it can be produced Absent to such order: Attorney-Client Privilege

EXHIBIT TL4

ANSWER: **Softek International Ltd. (in or about 1990); The Edge Interactive Media, Inc. (in or about 2008).**

Interrogatory No. 20

Identify all of Petitioner's subsidiaries and affiliated companies, and the officers thereof.

OBJECTION: **See objection to No. 1**

ANSWER: **The Edge Interactive Media, Inc.; Dr Tim Langdell**

Interrogatory No. 21

As to each of the above interrogatories, identify:

- (a) The person within Petitioner who has the greatest knowledge as to the information requested; and
- (b) All persons who participated in preparing each response.

OBJECTION: **See objection to No. 1**

ANSWER: **(a) Dr Tim Langdell; (b) Dr Tim Langdell**

Respectfully submitted,

By: /s/ Tim Langdell

CEO, Petitioner Edge Games Inc
530 South Lake Avenue, 171
Pasadena, CA 91101
Phone: 626 449 4334
Fax: 626 844 4334
Email: tim@edgegames.com

Date: October 5, 2015

Verification: I, Tim Langdell, CEO of Edge Games Inc, hereby state under penalty of perjury that the above answers are true to the best of my knowledge and belief.

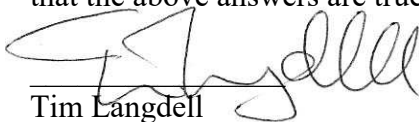

Tim Langdell

By: /s/ Tim Langdell

CEO, Petitioner Edge Games Inc
530 South Lake Avenue, 171
Pasadena, CA 91101
Phone: 626 449 4334
Fax: 626 844 4334
Email: tim@edgegames.com

Date: October 19, 2015

Verification: I, Tim Langdell, CEO of Edge Games Inc, hereby state under penalty of perjury that the above answers are true to the best of my knowledge and belief.


Tim Langdell

Interrogatory No. 20

Identify all of Petitioner's subsidiaries and affiliated companies, and the officers thereof.

OBJECTION: See general objections

ANSWER: The Edge Interactive Media, Inc.; Dr Tim Langdell

Interrogatory No. 21

As to each of the above interrogatories, identify:

- (a) The person within Petitioner who has the greatest knowledge as to the information requested; and
- (b) All persons who participated in preparing each response.

OBJECTION: See general objections

ANSWER: (a) Dr Tim Langdell; (b) Dr Tim Langdell

Respectfully submitted,

By: /s/ Tim Langdell

CEO, Petitioner Edge Games Inc
530 South Lake Avenue, 171
Pasadena, CA 91101
Phone: 626 449 4334
Fax: 626 844 4334
Email: tim@edgegames.com

Date: October 5, 2015
(further amended 12/5/15)

Verification: I, Tim Langdell, CEO of Edge Games Inc, hereby state under penalty of perjury that the above answers are true to the best of my knowledge and belief.

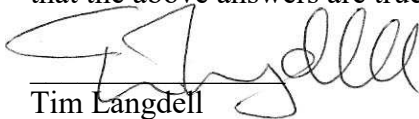

Tim Langdell

EXHIBIT TL5

September 11, 2015 to October 10, 2015 Calls on 626 824 0097

[illegible]

[illegible]

[illegible]

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